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Nationality Aspects of the Hong Kong Settlement

Robin M. White*

Nationality is commonly defined as the "legal tie between an individual and a state" or as "membership of a state."¹ Whether this is a satisfactory definition is a question which cannot be discussed here. Traditionally in U.K. law, nationality has been said to reflect a reciprocal relationship whereby the Crown offers protection, and the subject allegiance.² This begs even more questions.³ The Hong Kong settlement views nationality as concerning not only diplomatic and consular protection (a traditional international law view), but also rights of travel and immigration.

I. NATIONALITY LAW AND HONG KONG

A. U.K. Nationality Law⁴

The law today is confusing, and is best explained historically. Despite complications and anomalies, U.K. nationality law before the middle of the present century could be described as simple.⁵ Two categories

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¹ See, e.g., 2 D. O'CONNELL, *INTERNATIONAL LAW* 670-73 (2d ed. 1970); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 642-49 (Lauterpacht 8th ed. 1955); H.F. VAN PANHUYS, *THE ROLE OF NATIONALITY IN INTERNATIONAL LAW, AN OUTLINE* (1959); P. WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW*, 3-62 (2d ed. 1980). For a U.K. view, see C. PARRY, *NATIONALITY AND CITIZENSHIP LAWS OF THE COMMONWEALTH AND THE REPUBLIC OF IRELAND* 3-27 (1957).

² The best general discussion remains PARRY, *supra* note 1, at 28-91; see also M. JONES, *BRITISH NATIONALITY LAW AND PRACTICE* 28-73 (1947); M. JONES, *BRITISH NATIONALITY LAW* 51-86 (1956). The leading cases on "protection" are: *China Navigation Co. v. Attorney-General*, [1932] 2 K.B. 197 (C.A.); *Mutasa v. Attorney-General*, 1980 Q.B. 114. The leading cases on "allegiance" are: *Joyce v. Director of Pub. Prosecutions*, 1946 A.C. 347 (1945) (Lord Haw Haw's case), which is fascinating but flawed; see, e.g., Williams, *The Correlation of Allegiance and Protection*, 10 CAMBRIDGE L.J. 54 (1948). It is commonly assumed that English law, rather than Scots (or an amalgam), was adopted when the two states ceased to exist upon their union into Great Britain in 1707, and that Irish law made no contribution when Great Britain merged with it in 1800 to form the United Kingdom.

³ The *locus classicus* is the oft-quoted but obscurely reasoned and insufficiently analyzed *Calvin's Case*, 77 Eng. Rep. 377 (K.B. 1608).

⁴ There has been, of course, no such thing as "English nationality law" since 1707. See *supra* note 2 and accompanying text.

⁵ *Id.*

of persons existed: British subjects and aliens.⁶ In essence, four methods of becoming a British subject existed: mere birth in any part of the dominions of the Crown (the *jus soli*); descent in the male line from a subject (the *jus sanguinis*); naturalization; and by annexation of territory. There was also a class of technically alien British protected persons ("BPP"), generally the population of protectorates.⁷ All British subjects had a right of entry to the United Kingdom.⁸

1. The 1948 Scheme

The British Nationality Act of 1948⁹ introduced important reforms. First, there was a terminological change. The title British subject was retained, but a new synonym was coined for it: Commonwealth citizen.¹⁰ Second, the decision as to who was a British subject/Commonwealth citizen was in effect delegated to the independent Commonwealth countries (including the United Kingdom).¹¹ The method of delegation was formal acceptance of the proposal that each independent Commonwealth country should create its own citizenship. It was agreed that the same

⁶ Thus, there was a "common status" held by Australians, Canadians, Jamaicans, Scotsmen, etc., and those from Hong Kong. However, this was as much form as substance, since no rights necessarily flowed from British subjecthood in any jurisdiction. In Australia, Canada, and South Africa, racial categories operated to circumscribe civil liberties so that a British subject of Chinese origin might well be treated worse than a European alien. See, e.g., R. HUTTENBACK, *RACISM AND EMPIRE: WHITE SETTLERS IN THE BRITISH SELF-GOVERNING COLONIES 1830-1910* (1976); see also *Musgrove v. Chun Teeong Toy*, [1891] 16 A.C. 272 (P.C. 1890) (Victoria).

⁷ For discussion of this anomalous class, see PARRY, *supra* note 1, at 12-13, 89-91, 97, 147, 352. It comprised very various groups. One of the first official uses of the term appears to be in relation to the illegitimate offspring of British subject fathers and Chinese subject mothers. See 5 BRITISH DIG. INT'L L. (compiled principally from the Archives of the Foreign Office) (C. Parry 1965) [hereinafter BDIL]. More recently the class consisted of the inhabitants of protectorates and protected states, none of which now have that status.

⁸ *Director of Pub. Prosecutions v. Bhagwan*, 1972 A.C. 60 (H.L. 1970). Curiously, it was only after this right had been largely removed that the courts were induced to affirm its existence, see *infra* note 17. The delay is perhaps best explained (as is the restriction) by the fact that only in the 1950's did British subjects commence to use the right in significant numbers.

⁹ British Nationality Act, 1948, 11 & 12 Geo. 6, ch. 56. This Act came into force on January 1, 1949. *Id.* § 34(2).

¹⁰ *Id.* § 1(2)

¹¹ *Id.* § 1(1)&(3). There were nine then (other than the United Kingdom itself): Canada, Australia, New Zealand, Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia, and Ceylon. Newfoundland merged with Canada shortly thereafter. Southern Rhodesia was not technically independent, but was treated as such since it had been self-governing since 1923. Now Southern Rhodesia is Zimbabwe, Ceylon is Sri Lanka, and Pakistan is split into Bangladesh (which is in the Commonwealth) and Pakistan (which has left the Commonwealth, as has South Africa). The provision in each country's nationality law bestowing British subject/Commonwealth citizen status was referred to as the "common clause." This replaces "common status." See *supra* note 6. However, Ceylon and South Africa declined to adopt the "common clause" provision as did Ireland by virtue of its essentially republican constitution in 1936.

methods of acquisition would be employed, *mutatis mutandis*.¹² These new citizenships were thus gateways to British subjecthood/Commonwealth citizenship and all British subjects already in being were allotted to the appropriate "gateway citizenship."¹³ Inevitably a few people fell between stools. For them an *ad hoc* status of British subjects without citizenship ("BSWC") was created.¹⁴ BPP continued unchanged.¹⁵ As to the dependent parts of the Commonwealth, since they were dependencies of the United Kingdom, they shared its "gateway citizenship," which was named Citizenship of the United Kingdom and Colonies ("CUKC").¹⁶

Until 1962, all British subjects/Commonwealth citizens retained the right to enter the United Kingdom. It was then restricted to those born there or holding a U.K. Government issued (rather than colonial government issued) passport.¹⁷ Thus, a class of CUKCs was created with no right to enter the United Kingdom, although they had a right to enter a colony.¹⁸

2. Decolonization

Decolonization fitted easily into the scheme.¹⁹ Each independence

¹² See PARRY, *supra* note 1, at 93-4.

¹³ See 1948 British Nationality Act, §§ 12-14.

¹⁴ *Id.* § 13, sched. 3.

¹⁵ The most important group were Tamils in Sri Lanka. That country, as well as declining to apply the "common clause," did not use the *jus soli*. See *supra* note 11. This was to ensure that Tamils of Indian origin did not become Sri Lankan citizens. See PARRY, *supra* note 1, at 793-95. Relations between Tamils and Sinhalese are notoriously even worse today. Since some of the Tamils did not become Indian citizens either because of rules in the Indian citizenship law designed to cope with the partition of the subcontinent into India and Pakistan, they became BSWCs. Originally it was intended that BSWCs become CUKCs, but this was never effected since the United Kingdom never recognized Indian or Pakistani citizenship laws. See PARRY, *supra* note 1, at 307 (Parry's hopes were never fulfilled.). The BSWC category also contained, and contains, a substantial number of people who became Irish citizens, but wished to retain a U.K. connection, and therefore were given the right to acquire this status. *Id.* at 301-02, 306-07.

¹⁶ 1948 British Nationality Act, §§ 1(1), 4-22.

¹⁷ Commonwealth Immigrants Act, 1962, 10 & 11 Eliz. 2, ch. 21 (especially § 1(3)). *Ex parte Bhurosah* [1968] 1 Q.B. 266 (C.A.). The Act was designed to reduce "coloured immigration." Restriction of entry to CUKCs (the more obvious course) would have kept out those from India and Pakistan, but not those from the West Indies (those being the two important sources of such immigration), which were then still colonies. See, e.g., J. M. EVANS, IMMIGRATION LAW 63-64 (2d ed. 1983); P. FOOT, IMMIGRATION AND RACE IN BRITISH POLITICS *passim* (1965).

¹⁸ In fact, this right depended upon local colonial legislation and it would have been possible for some CUKCs not to have such a right, since such legislation frequently required domicile as a condition of entry. Thus, a child born in a colony of a CUKC father domiciled in an alien territory with a passport issued by a colonial government would be at risk. See JUSTICE, BRITISH NATIONALITY: THE REPORT OF A WORKING PARTY app. C (1980).

¹⁹ At the time of the British Nationality Act of 1948, the United Kingdom had about 50 colonies and protectorates. The great majority of these are now independent. Of the dozen inhabited

act²⁰ stipulated that those acquiring citizenship of the new state thereby lost CUKC status (unless they were expatriates born there, but had an ancestral connection with the United Kingdom).²¹ The new citizenship was added to the list of "gateway citizenships" in the 1948 Act.²²

Variations did occur. Most important is that the East African countries provided that only those of African descent acquired citizenship upon independence.²³ Others, chiefly settlers from the Indian subcontinent, thus remained CUKCs.²⁴ Since *ex hypothesi* no colonial government remained, they held U.K. issued passports and thus retained the right of entry to the United Kingdom under the 1962 legislation.²⁵ They might apply for the new citizenship after independence;²⁶ however, some who attempted it found their applications lost, and others declined to try. When further "Africanisation" rendered life intolerable in Kenya, these "East African Asians" sought to enter the United Kingdom.²⁷ The Government immediately introduced legislation revoking their right.²⁸ This

dependencies which remain, only Hong Kong could conceivably be independent. Pitcairn Island, for instance, had a population of 61 in 1980. See BRITISH NATIONALITY LAW: OUTLINE OF PROPOSED LEGISLATION, 1980, CMND. NO. 7987, app. C.

²⁰ The normal pattern was for an act of parliament to grant independence. The Constitution of the new country, including its nationality or citizenship law, was contained in an Order in Council (i.e. a dignified form of delegated legislation made under powers given by the Act). See, e.g., Zambia Independence Act, 1964, 12 & 13 Eliz. 2, ch. 65; Zambia Independence Order, S.I. 1964, No. 1652.

²¹ E.g., Nigeria Independence Act, 1960, 8 & 9 Eliz. 2, ch. 60, §§ (2), 2(3)-(5). Section 2(2) removes CUKCship and sections 2(3)-(5) make the exceptions.

²² *Id.* § 2(1). For "gateway citizenships," see *supra* note 11 and accompanying text.

²³ Rule 1(1) of the Kenya Independence Order provided that no person should become a citizen of Kenya unless one or both parents were born in Kenya. Kenya Independence Order, S.I. 1963, No. 1968. Cf. Uganda Independence Order, S.I. 1962, No. 2175, rules 7,8.

²⁴ See, e.g., STEEL, NO ENTRY (1968).

²⁵ See Commonwealth Immigrants Act, *supra* note 17.

²⁶ E.g., Kenya Independence Order, *supra* note 23, rule 2(1).

²⁷ See *supra* note 24.

²⁸ See Commonwealth Immigrants Act, *supra* note 17. This Act mirrored the "expatriate clauses" by requiring United Kingdom Passport Holders (UKPH), as they have become called, to have an ancestral connection with the United Kingdom. Clearly few, if any, East African Asians could fulfill this requirement. This episode was highly embarrassing for the U.K. Government which was accused of breaches of the European Convention on Human Rights. See *East African Asians v. United Kingdom*, 3 EUROPEAN HUMAN RIGHTS REP. 76 (1981). The European Commission on Human Rights found the complaint admissible, but referred it to the Committee of Ministers, not the European Court of Human Rights. Nevertheless, the Act was held to be racially discriminatory, violating article 1 of the Convention (protecting against degrading treatment), and in some cases article 8 (protection of family life) and article 14 (sexual discrimination). The U.K. Government did introduce a "Special Voucher Scheme" to admit the UKPH, which still continues and is subject to various criticisms. For discussion, see J. M. EVANS, IMMIGRATION LAW 120-22 (2d ed. 1985). A slightly more generous reception was given to those expelled from Uganda in 1972. See HUMPHREY & WARD, PASSPORTS AND POLITICS (1974); R. MOORE & T. WALLACE, SLAMMING THE DOOR: THE ADMINISTRATION OF IMMIGRATION CONTROL (1975). See also HOME AFFAIRS COMMITTEE: NUMBERS AND LEGAL STATUS OF FUTURE BRITISH OVERSEAS CITIZENS

resulted in the creation of three classes of CUKCs: those with a right of entry to the United Kingdom, those with a right to enter a colony, and those with no right to enter anywhere.

3. The 1983 Scheme

The embarrassment of this position produced the British Nationality Act of 1981.²⁹ This retained the status of Commonwealth citizen,³⁰ but confusingly transferred the title British subject to those formerly called British subjects without citizenship.³¹ It also replaced CUKC status with three new "gateway citizenships," closely coinciding with the three classes of CUKCs.³² These are British citizenship ("BC"),³³ British dependent territory citizenship ("BDTC"),³⁴ and British Overseas citizenship ("BOC").³⁵ It should be noted that over 90% of those holding BDTC were and are in Hong Kong.³⁶

Methods of acquisition were changed too. Birth in the United Kingdom or a colony confers BC status or BDTC status, respectively, but only if a parent, in the first case, is a BC or settled in the United Kingdom, and in the second case, is a BDTC or settled in a colony.³⁷ BOC status was ascribed at the coming into force of the 1981 Act and, subject to minor exceptions, could not be acquired thereafter.³⁸

Another new method was introduced as an amendment during the passage of the bill through Parliament, after pressure from Hong Kong

WITHOUT OTHER CITIZENSHIP, HOUSE OF COMMONS SECOND REPORT, 1980-81, H.C. Paper No. 158.

²⁹ British Nationality Act, 1981, 29 & 30 Eliz. 2, ch. 61. The Act came into force on Jan. 1, 1983. British Nationality Act, 1981, (Commencement Order 1982), S.I. 1982, No. 933.

³⁰ 1981 British Nationality Act, § 37.

³¹ *Id.* pt. IV, §§ 30-35.

³² All are defined in terms of the means of acquisition, rather than contents or result, save that section 39 amends the Immigration Act of 1971 to give British citizens the "right of abode" in the United Kingdom. *Id.* pt. V, § 39; see *infra* note 39 and accompanying text. No collective name exists for the three, possibly to avoid any admission that all have a presumptive right of entry. In addition to the "gateway citizenships," there have grown up a number of *ad hoc* statuses, often called "UK national," in various statutes referring to international obligations. *E.g.*, Deep Sea Mining (Temporary Provisions) Act, 1981, 29 & 30 Eliz. 2, ch. 53, § 1(4). (This includes not only the three new citizenships, but also British subjects without citizenship and British protected persons). The best known and most important such status—not in municipal law *stricto sensu*—is "UK national for [EEC] community purposes."

³³ See 1981 British Nationality Act, pt. I, § 39.

³⁴ *Id.* pt. II. The dependencies are defined by reference to a list in schedule 6.

³⁵ *Id.* pt. III.

³⁶ See *supra* note 19 (which provides the figures from which these calculations were made).

³⁷ 1981 British Nationality Act, §§ 1(1), 15(1). Variations upon it exist (e.g. a right to register if parents become citizens or settled before the child's majority). *Id.* §§ 1(3), 15(3).

³⁸ *Id.* § 26 (section 27 allows registration of minors; section 28 allows registration of spouses).

before negotiations with China had opened.³⁹ It allows a person to be registered as a BC (and thus acquire a right of entry to the United Kingdom) if the Secretary of State "thinks fit in the special circumstances of the . . . case . . . [and the person has been] in Crown service under the government of a [colony] . . . [or] a member of any body established by law in a [colony], the members of which are appointed by . . . the Crown."⁴⁰

4. What is the "Real" Nationality?

Suffice it to say that so far as the United Kingdom and its colonies are concerned, Commonwealth citizenship has remained the "real" status for municipal purposes,⁴¹ except with respect to immigration. Thus, Commonwealth citizenship governs the franchise, entry to government service, etc. This "gateway" status is nationality for international purposes.⁴² However, clearly the present form of the law derives largely from the desire to restrict entry.⁴³

B. Chinese Nationality Law

Chinese nationality law was recently recast, albeit without major change of principle.⁴⁴ Acquisition of nationality is essentially *jure*

³⁹ See debate in Standing Committee on 1981 British Nationality Act: OFFICIAL REPORT, HOUSE OF COMMONS, Standing Committee F, Mar. 31, 1981, pts. 1, 2, cols. 903-914 (23rd Sitting).

⁴⁰ 1981 British Nationality Act, § 4(5), (6). The significance of the drafting lies in the assumption that civil servants (etc.) feared reprisals after 1997. A very high proportion of the population are civil servants, since "local government" functions are carried out by the central government. See *supra* note 39, cols. 904, 906-7.

⁴¹ The franchise is bestowed, for example, upon all resident Commonwealth citizens. See Representation of the People Act, 1949, 12 & 13 Geo. 6, ch. 68, §§ 1(1), 2(1) (as amended).

⁴² Authority is lacking largely because diplomatic and consular protection cannot be sued for. See cases cited *supra* note 2. However, *Mutasa* (the post-1948 British Nationality Act case) was a first instance decision in which the Crown conceded a duty to British subjects/Commonwealth citizens resident in Southern Rhodesia (as it then was), it being part of the dominions of the Crown, albeit in rebellion at the time. Thus, the central issue was avoided. Nevertheless, on general principle, while the Crown may have a political or moral duty to protect "subjects" (i.e., now Commonwealth citizens), the Crown in right of HM Government of the United Kingdom can only be responsible for those connected with the United Kingdom, while the Crown in right of, say, Canada, is responsible for those connected with Canada. Equally, a British citizen would expect U.K. Government assistance in a dispute with Canadian authorities and *vice versa*. This conclusion is supported by S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 148-49 (5th ed. 1985) (note, however, that the reference at page 441 is difficult to reconcile).

⁴³ It is paradoxically but clearly the case that there is no such thing as a "British national" or "U.K. national" in municipal law. *Contra supra* note 32 (exceptions).

⁴⁴ The Nationality Law of the People's Republic of China [hereinafter NLPRC] (adopted by the Fifth National People's Congress on July 10, 1980). No official translation was distributed. See Official Report, House of Lords, vol. 460, col. 508. Photocopies of an unofficial translation are available. See news release from New China News Agency (Sept. 14, 1980; Beijing). The new law is discussed at length by Ginsburgs who notes that the previous law was very uncertain (being the 1929

sanguinis only.⁴⁵

The principal provision is that "any person born in China whose parents are Chinese nationals or one of whose parents is a Chinese national has Chinese nationality."⁴⁶ Also, "any person born abroad whose parents are Chinese nationals or one of whose parents is a Chinese national has Chinese nationality," provided they have not settled abroad and the child has not acquired a foreign nationality upon birth.⁴⁷

Aliens and stateless people may become naturalized if they are "willing to abide by China's constitution" provided they have close relatives in China, are settled there, or have "other legitimate reasons."⁴⁸ The children born in China of people who are stateless or of uncertain nationality settled in China are Chinese nationals.⁴⁹

Dual nationality is not allowed, thus voluntary naturalization abroad removes Chinese nationality⁵⁰ and a person naturalized in China is "[not] permitted to retain foreign nationality."⁵¹

C. *International Law on Nationality*

Broadly, customary international law leaves the settlement of questions of nationality to municipal law.⁵² None of the cases (such as the famous *Nottebohm*⁵³ decision) throws much light on the Hong Kong question. The various conventions on nationality law have no particular application to the situation, with the exception of the Hague Convention on Certain Questions Relating to Conflicts of Nationality Law (1930). This Convention recognizes the autonomy of municipal systems, but declares the following precepts: 1) that a dual national may not be represented by one of his or her states against the other,⁵⁴ and 2) that a third state confronted with competing assertions of nationality should apply

legislation of the Nationalist Government which was formally rejected by the Communist Government). See Ginsburgs, *The 1980 Nationality Law of the People's Republic of China*, 30 AM. J. COMP. L. 459 (1982). Ginsburgs does not consider the law in relation to Hong Kong.

⁴⁵ Article 2 of the NLPRC does describe the P.R.C. as a "unified, multi-national country" and asserts that "persons belonging to any of the nationalities of China have Chinese nationality." NLPRC, *supra* note 44. This is obscure and may be a political rather than legal statement. For discussion, see Ginsburgs, *supra* note 44, at 460-61.

⁴⁶ NLPRC, *supra* note 44, art. 4.

⁴⁷ *Id.* art. 5.

⁴⁸ *Id.* art. 7. Those living in Hong Kong are not regarded as being abroad, since China claims sovereignty over the territory, see *infra* notes 60, 63, 107 and accompanying text.

⁴⁹ NLPRC, *supra* note 44, art. 6.

⁵⁰ *Id.* art. 9.

⁵¹ *Id.* art. 8.

⁵² See 2 D. O'CONNELL, *supra* note 1, ch. 21, at 678-81. See also, Convention on Conflict of Nationality Laws, Apr. 12, 1930, arts. 1-2, 179 L.N.T.S. 89.

⁵³ *Nottebohm* (Liechtenstein v. Guatemala), 1955 I.C.J. 5; Flegenheimer, 25 I.L.R. 91 (Italian-U.S. Conciliation Comm'n 1958); Mergé, 22 I.L.R. 443 (Italian-U.S. Conciliation Comm'n 1955).

⁵⁴ Convention on Conflict of Nationality Laws, *supra* note 52, art. 4.

either the test of "habitual and principal residence" or "most close connection."⁵⁵

II. HONG KONG, ITS PEOPLE, NATIONALITY AND IMMIGRATION

A. U.K. Acquisition of the Land⁵⁶

Hong Kong Island was acquired by the Treaty of Nanking of 1842,⁵⁷ while a thin strip of the mainland and the adjacent Stonecutters Island were acquired by the Treaty of Peking of 1860.⁵⁸ Both treaties are regarded by the United Kingdom as cessions. It has recently been suggested that the imperial Chinese government did not so regard them.⁵⁹ In any case, both have been regarded by subsequent Chinese governments as "unequal treaties," thus void or voidable.⁶⁰

The great majority of the land, still known as the "New Territories," was acquired by the (second) Convention of Peking of 1898,⁶¹ through what was described as a "lease" for ninety-nine years (thus, the significance of July 1, 1997). However, whatever the contemporary Chinese view, the United Kingdom considered (and continued to consider) it as tantamount to cession.⁶² Chinese governments have regarded it as

⁵⁵ *Id.* art. 5.

⁵⁶ Acquisition occurred as part of the "Opium Wars" (in which European and American traders sought to compel the Chinese Empire to trade, particularly in opium) and resulting relations. For a general account of the period, see 10 D. TWITCHETT & J. FAIRBANK, *THE CAMBRIDGE HISTORY OF CHINA (LATE CH'ING, 1800-1911)* (1978); 11 D. TWITCHETT & J. FAIRBANK, *THE CAMBRIDGE HISTORY OF CHINA (LATE CH'ING, 1800-1911)* (1980). For a recent and fascinating fictionalized account, see T. MO, *AN INSULAR POSSESSION* (1986).

⁵⁷ Treaty of Nanking, Aug. 29, 1842, Great Britain-China, 30 British & Foreign State Papers (Gr. Brit.) 389, reprinted in *HERTSLET'S CHINA TREATIES* 7-12 (3d ed. 1908) [hereinafter HCT]; 5 BDIL, *supra* note 7, at 148 (relevant portions are quoted therein). This treaty was chiefly concerned with setting up the "Treaty ports," exacting war reparations, and ensuring free trade.

⁵⁸ Convention of Friendship, Oct. 24, 1860, Great Britain-China, 30 British and Foreign State Papers (Gr. Brit.) 10-12; HCT, *supra* note 57, at 48-50; relevant portions are quoted in 5 BDIL, *supra* note 7, at 110-12. It is also chiefly concerned with reparations and with amendment of the Treaty of Shanghai of 1858.

⁵⁹ Dicks, *Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong*, 95 CHINA QUARTERLY 427, 445-46 (1983).

⁶⁰ *Id.* at 434-35. By virtue of the Vienna Convention on the Law of Treaties (1969), international law recognizes that a treaty may be void if procured by force or threat when it is contrary to the principles of the United Nations Charter (arts. 53, 64, 71); this, however, is not retrospective. See 1 D. O'CONNELL, *INTERNATIONAL LAW* 244 (2d. ed. 1970).

⁶¹ Convention for the Extension of Hong Kong Territory, June 9, 1898, Great Britain-China, 1 HCT 130-31. The reasons for the extension are discussed in WESLEY-SMITH, *UNEQUAL TREATIES 1898-1997: CHINA, GREAT BRITAIN, AND HONG KONG'S NEW TERRITORIES* 29-44 (1980).

⁶² The New Territories Order in Council (Oct. 20, 1898) roundly declared the New Territories to be "part and parcel of HM Colony of Hong Kong in like manner and for all intents and purposes as if they had originally formed part of said colony." In 1911, the Governor of Hong Kong, specifically in relation to nationality, asserted "... it is, I presume, inconceivable that the [New Territories] will ever revert to China." 5 BDIL, *supra* note 7, at 404.

"unequal."⁶³

International law recognizes cession as a means of transfer of territory.⁶⁴ "Leases" have been too rare for any jurisprudence to arise.⁶⁵ The doctrine of "unequal treaties" is not accepted as such.⁶⁶

B. U.K. Acquisition of the People

The 1942 Treaty of Nanking and the 1860 Treaty of Peking did not mention their effect on nationality. Under U.K. municipal law, cession bestows nationality without necessarily assuming the old nationality to be lost.⁶⁷ Thus, while regarding the inhabitants of Hong Kong as British subjects, it did not deny Chinese claims that the ceded population remained Chinese. International law accepts this, but the Hague Convention principles, applied retrospectively, would favor British subjecthood in the event of a conflict.⁶⁸

The third treaty, the 1898 Convention of Peking, did not mention nationality either, and U.K. municipal law does not explicitly deal with the effect of such a "lease" on nationality. Nevertheless, from early days the population was assumed to have become British subjects.⁶⁹ It is in-

⁶³ Wesley-Smith doubts if the 1898 treaty can be regarded as unequal. See WESLEY-SMITH, *supra* note 61, at 184-185. Dicks is equivocal. See Dicks, *supra* note 59, at 434, 451-53.

⁶⁴ 1 D. O'CONNELL, *supra* note 1, at 431-34.

⁶⁵ O'Connell records a lease in 1888 of Zanzibari territory to the British East Africa Company. *Id.* at 329. Part of this was assigned to Italy, then "sold" outright. The rest was taken over in 1895 by the U.K. Government and ultimately passed to Kenya. Dicks refers to a lease of territory "south of the Namwan River" under the Agreement of Feb. 4, 1897, modifying the Burma Frontier and Trade Convention of March 1, 1894. Dicks, *supra* note 59, at 448 n.80 (quoting TREATIES, CONVENTIONS, ETC. BETWEEN CHINA AND FOREIGN STATES: CHINA, THE MARITIME CUSTOMS, III-MISC. SERIES, No. 30 (2d ed. 1917)). This was regarded as Chinese territory but the Agreement declared that China "shall not exercise any jurisdiction or authority whatever" and that the U.K. Government "will hold it on a perpetual lease from China, paying rent for it. . ." (fixed at 1,000 rupees per annum). *Id.*

⁶⁶ But see Vienna Convention, *supra* note 60.

⁶⁷ PARRY, *supra* note 1, at 73-74. It was seriously contended as late as 1824 (in an English case), that the inhabitants of the Thirteen Colonies still retained British subjecthood (and the War of 1812 depended partly upon that conclusion). Doe d. Thomas v. Acklam, 107 Eng. Rep. 572 (1824). Parry also refers to Stewart v. Hoome, XI-XII Mo. Dic. 4649 (1792) (erroneously cited as 6 Mo. Dic. 4649), an earlier Scottish case of first instance so holding, and Shedden v. Patrick, 1 Macq. 535 (1854) (erroneously cited as 1 Macy 525), a later Scottish case on appeal to the House of Lords who admitted U.S. alienage. *Id.* at 73 n.18.

⁶⁸ See *supra* note 52.

⁶⁹ In fact, in the Foreign Office (as opposed to the Colonial Office) considerable doubt existed immediately after the lease and there is a respectable argument that in U.K. law, the New Territories population were not acquired. This is discussed at length in White, *Hong Kong, Nationality and the British Empire: Historic Doubts and Confusions on the Status of the Inhabitants*, 17 HONG KONG L.J. (forthcoming). In brief, the argument is that a lease does not transmit sovereignty. Thus, the inhabitants did not become British subjects at the time (and nothing in later legislation mended the

teresting that the possibility of their becoming British protected persons⁷⁰ was tacitly rejected.

Given that the agreement was a "lease," Chinese claims to nationality can hardly be denied. Given the rarity of "leases," *a fortiori* international law is unhelpful, but again the Hague Convention principles would favor British subjecthood.⁷¹

C. The Present Population of Hong Kong

The population of Hong Kong is 5.5 million.⁷² Two percent are not of Chinese origin.⁷³ These ethnic minorities among the permanent population include about 6,000 people of ultimately Indian subcontinent origin, 2,000 of European origin, and small numbers of "Eurasians," Malaysians, and Indo-Chinese.⁷⁴ All of them or their ancestors arrived during U.K. rule. There are also several thousands of Vietnamese "boat people" awaiting resettlement.⁷⁵

Of the 98% of Chinese origin, an extraordinary 40% are recent immigrants from China.⁷⁶ Many left China, and entered Hong Kong, ille-

defect in title). So if they became British subjects the Territories must, at some time, have been annexed unilaterally (which is not admitted by the U.K. Government).

⁷⁰ See *supra* note 7.

⁷¹ See *supra* note 52.

⁷² HONG KONG 1986 (Hong Kong Government Annual Report). The population declined from 850,000 in 1931 to 600,000 in 1946, largely as a result of the Japanese occupation (Hong Kong was attacked on the same day as Pearl Harbor). It rose to 1,800,000 by 1947, over 3,000,000 by 1961 and 4,000,000 in 1971, as much by immigration from China as by natural increase. Many entrants in the early 1960s were refugees from the Cultural Revolution, and many in the late 1970s benefited from liberalization of the regime. See *infra* note 76.

⁷³ HONG KONG 1986, *supra* note 72.

⁷⁴ JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS, A QUESTION OF BELONGING: BRITISH NATIONALITY LAW AND THE FUTURE OF HONG KONG (1985). Somewhat higher figures, based on the 1981 Census, are given in an official pamphlet. HONG KONG GOVERNMENT INFORMATION SERVICES, HONG KONG: THE FACTS: POPULATION (1986).

⁷⁵ In mid-1986 there were 11,000. This figure fluctuates since a small number resettle annually, yet unpredictable numbers of people often arrive. For a general discussion, see HOME AFFAIRS COMMITTEE: REFUGEES AND ASYLUM WITH SPECIAL REFERENCE TO THE VIETNAMESE, HOUSE OF COMMONS THIRD REPORT, 1984-85, H.C. Paper No. 72; HOME OFFICE GOVERNMENT REPLY TO THE THIRD REPORT, 1985, CMND. No. 9629.

⁷⁶ HONG KONG GOVERNMENT INFORMATION SERVICES, HONG KONG: THE FACTS: IMMIGRATION (1986). See also, Clarke, *Hong Kong Immigration Control: The Law and the Bureaucratic Maze*, 16 HONG KONG L.J. 342, 343 (1987). This massive immigration is one of the most interesting features in the study of Hong Kong nationality and immigration. See *supra* note 72. Their work has been a foundation for the colony's wealth, although many were refugees. The implications for the nationality aspects of the Settlement are considerable, since there is a large non-national, but settled and welcome, population who left China for economic, political, and other reasons. (The border is arbitrary in terms of family lineages). Clarke records that 27,000 are still admitted for settlement annually despite recent restrictions. Clarke, *supra* note 76, at 361. It is reported that in mid-1987, considerable pressure is building up in China to enter Hong Kong for economic reasons. See, e.g., The Times (London), June 27, 1987.

gally. Until 1980, the "reach base" policy was used; that is, illegal entrants reaching an urban area were given permission to stay.⁷⁷

1. The Present Population and Chinese Nationality

Since Chinese nationality operates essentially *jure sanguinis*, all those of Chinese origin are Chinese nationals.⁷⁸ Those becoming naturalized as BDTCs might be an exception under the rule against dual nationality,⁷⁹ but China might decline to accept the validity of such acts. Since Hong Kong is not "abroad," the Chinese nationality law provisions relating to settlement abroad do not apply.

2. The Present Population and U.K. Nationality Law

Since the orthodox U.K. view is that the whole of Hong Kong is part of the dominions of the Crown,⁸⁰ those born there are BDTCs by virtue of such birth⁸¹ (save those born since the British Nationality Act of 1981 who require a BDTC or a settled parent),⁸² irrespective of ethnic origin. Naturalized immigrants⁸³ and the progeny of either group born abroad are also BDTCs.⁸⁴ It is estimated that there are 3.25 million BDTCs in Hong Kong: 3.19 million by birth, 53,000 by naturalization, and a few by descent.⁸⁵

⁷⁷ See Clarke, *supra* note 76, at 361.

⁷⁸ See *supra* notes 46-47 and accompanying text; but see *supra* notes 48-49 and accompanying text.

⁷⁹ See *supra* note 50 and accompanying text.

⁸⁰ But cf. *supra* note 69.

⁸¹ In the case of those born before Jan. 1, 1949 (commencement of the 1948 British Nationality Act), they were born British subjects, remained so thereafter (subject to the alternative title Commonwealth citizen), but were allotted to CUKC status. See *supra* notes 9, 10, 16 and accompanying text. Having lost the right of entry to the United Kingdom in 1962, they were allotted to BDTC status under 1981 British Nationality Act. See *supra* notes 17, 29, 34 and accompanying text. In the case of those born from 1949 through 1982, they are in the same position as those born earlier, *mutatis mutandis*.

⁸² 1981 British Nationality Act, pt. II, § 15(1). The change is important to the descendants of those illegally entering since the end of the "reach base" policy in 1980, and to those of Vietnamese refugees, since neither will now automatically acquire a U.K. nationality at birth. See *supra* note 77 and accompanying text.

⁸³ The cases of those naturalized either before 1949 or between 1949 and 1982 inclusive (the latter naturalized under the 1948 British Nationality Act or registered under §§ 6-9) parallel the cases of those born in Hong Kong in the same time periods. See *supra* note 81.

⁸⁴ 1948 British Nationality Act, § 16; 1981 British Nationality Act, § 16 (not all descendants beyond the first generation are citizens). The 1981 British Nationality Act provisions are complicated, but allow inheritance of nationality from either parent.

⁸⁵ HONG KONG: THE NATIONALITY PROVISIONS OF THE HONG KONG ACT 1985: A DRAFT ORDER IN COUNCIL, 1986, CMND. NO. 9637, para. 10. The actual Order in Council was issued as a statutory instrument. See *infra* note 152.

3. The Present Population and Hong Kong Immigration Status

Hong Kong immigration law is complicated.⁸⁶ Effectively, however, by virtue of a Hong Kong connection (whether Chinese or from ethnic minorities) BDTCs are "Hong Kong belongers."⁸⁷ They have a right to land (i.e. to enter Hong Kong), and cannot be deported or otherwise removed.⁸⁸ This group constitutes about 60% of the population.⁸⁹ There are also a few "resident British Citizens" with similar rights.⁹⁰

The 40% of the population who are neither Hong Kong belongers nor resident British citizens have various statuses. Those who are "wholly or partly of Chinese race" and who have "at any time been resident in Hong Kong for a continuous period of not less than seven years" are "Chinese residents."⁹¹ They have a right to land, but may be deported on certain grounds.⁹² Non-Chinese have no equivalent status, but those with nine years residence are normally granted indefinite leave to remain.⁹³ Almost all the rest are Chinese who have not met the seven year residence requirement. They, and non-Chinese without nine years residence, have no right to land, but are admitted subject to various conditions.⁹⁴

III. THE HONG KONG SETTLEMENT⁹⁵

The reasons for the settlement throw light on the nature of the na-

⁸⁶ See Hong Kong Immigration Ordinance, ch. 115 (1984) [hereinafter HKIO]. For a comprehensive discussion, see Clarke, *supra* note 76.

⁸⁷ HKIO, § 2(1), sched. 1 ("Hong Kong belonger").

⁸⁸ *Id.* §§ 7, 8; *id.* pt. V.

⁸⁹ Coinciding very closely, of course, with the BDTC population.

⁹⁰ HKIO, § 2(1) ("resident British citizen").

⁹¹ *Id.* ("Chinese resident").

⁹² *Id.* §§ 7, 8; *id.* pt. V.

⁹³ Clarke, *supra* note 76, at 359.

⁹⁴ HKIO, §§ 7, 11, 13. British citizens not "resident" are readily admitted. Clarke, *supra* note 76, at 358-59. The Vietnamese refugees enter under special provisions as they are admitted for resettlement elsewhere; they are, thus, not "ordinarily resident" so cannot become "residents" or "belongers" (except for a few resettled in Hong Kong itself). See HKIO, pt. III(A). All those entering since August 1982 are detained in "closed camps." Immigration (Vietnamese Refugee Centres) (Closed Camps) (Designation) Order 1982 (made under HKIO § 13C(1)). This does not affect their status.

⁹⁵ The settlement is delineated in a White Paper (released in both Chinese and English) entitled: A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong [hereinafter Draft Agreement], Cmnd. 9352, Misc. No. 20 (1984), *reprinted in* 23 I.L.M. 1366 (1984). The Draft Agreement contains 1) an Introduction, 2) a Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong [hereinafter Joint Declaration], 3) an Exchange of Memoranda on nationality [hereinafter Exchange], and 4) Explanatory Notes. The Joint Declaration contains three Annexes, the first being a lengthy Elaboration by the Government of the

tionality provisions. For China there were perhaps two imperatives: reintegration of the territory and people (thus overcoming a national humiliation),⁹⁶ and maintenance of Hong Kong as a wealthy economic enterprise and window on the world.⁹⁷ These imperatives can clearly conflict. Undoubtedly, a further factor was the precedent to be created for future reintegration of Taiwan.

For the United Kingdom, the imperative was the need to maintain business confidence and, thus, the very viability of the colony with the onset of 1997. Further, a population of BDTCs and aliens under U.K. protection requires reassurance as to their future, not the least on prudential grounds. The United Kingdom had no desire to become responsible for 5.5 million disaffected people half a world away. There is also an ambivalence towards the Commonwealth, including a desire to reduce post-imperial obligations (the Falklands affair notwithstanding).⁹⁸ It is also significant that Hong Kong has about fifty times the population of all other dependencies combined.⁹⁹

People's Republic of China of its Basic Policies regarding Hong Kong [hereinafter Annex I]. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, United Kingdom-People's Republic of China, 1984 Gr. Brit. T.S. No. 20 (Cmnd. 9352), *reprinted in* draft form in 23 I.L.M. 1371 (1984). The Joint Declaration alone was finally published (in English and Chinese) as Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of People's Republic of China on the Question of Hong Kong, 1985 Gr. Brit. T.S. No. 26 (Cmnd. 9543). The Introduction and the Explanatory Notes were both drafted by the U.K. Government. The latter is sometimes a useful interpretive device, but it should be remembered that it is a document drafted by one signatory interpreting *ex parte* the intentions of the other.

⁹⁶ This is notorious and clear from the wording of the Joint Declaration. See Joint Declaration, *supra* note 95. Paragraph (3)(1) declares the first of the "basic policies" to be "upholding national unity and territorial integrity." *Id.* para. 3(1).

⁹⁷ This is also clear from the opening recital of the Joint Declaration which refers to a negotiated settlement as being "conducive to the maintenance of the prosperity and stability of Hong Kong." *Id.* preamble. Howe asserts that China enjoys a large trade surplus with Hong Kong, that it earns foreign exchange through Hong Kong's free port, and that Hong Kong is a center for trade contacts, financial negotiations and obtaining commercial intelligence. See HONG KONG: IN SEARCH OF A FUTURE (Cheng ed. 1984) (quoting Howe, *Growth, Policy and Hong Kong's Economic Relations with China*, 95 CHINA Q. 512-33, 530).

⁹⁸ From a nationality point of view the Falklands affair was interesting. Under the 1948 British Nationality Act, those born in the Falklands were CUKCs (the Falklands being a colony) and thus were British subjects/Commonwealth citizens. See *supra* note 16 and accompanying text. As with other colonial populations, such CUKCs lost the right of entry to the U.K. in 1962 and became BDTCs under the 1981 British Nationality Act. See *supra* note 17 and accompanying text. However, in the wake of the armed conflict, a Private Member's Bill was introduced, which the Government allowed to pass, rendering BDTCs by virtue of their connection with the Falkland Islands British citizens. This was clearly symbolic in that the U.K. sought to recover the Islands after the Argentine invasion without requiring the population to be British citizens, and in that all but 400 of them were British citizens under the Act already. See *The Times* (London) Nov. 30, 1982.

⁹⁹ This inference is drawn from figures quoted in BRITISH NATIONALITY LAW: OUTLINE OF

Thus, a convergence of the interests of the two states—U.K. and P.R.C.—occurred at a time when a doctrinaire Chinese leadership had given way to a pragmatic one.¹⁰⁰ This nevertheless underlines that the decolonization of Hong Kong is not a process whereby government is handed over to local people colorably representative of their population.

IV. THE NATIONALITY PROVISIONS OF THE HONG KONG SETTLEMENT

The Joint Declaration itself does not refer directly to nationality. The first numbered paragraph does declare that the Chinese Government "has decided to resume the exercise of sovereignty over Hong Kong,"¹⁰¹ and the third numbered paragraph (reciting the Chinese Government's "basic policies") refers to "[u]pholding national unity and territorial integrity."¹⁰² The same paragraph, however, also refers to "taking account of the history of Hong Kong and its realities."¹⁰³ It also provides that the Hong Kong Special Administrative Region ("HKSAR") "may on its own issue travel documents for entry into and exit from Hong Kong."¹⁰⁴

A. *The Chinese Position on Nationality*

The Joint Declaration does cross-refer to nationality in the first of its three Annexes.¹⁰⁵ The first Annex, an "Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Hong Kong" ("Elaboration"), refers to the "right of abode" in the newly created HKSAR.¹⁰⁶ But again, the document does not expressly mention nationality. Specific mention is made in the Chinese Memorandum in an Exchange of Memoranda appended to the Joint Declaration

PROPOSED LEGISLATION, *supra* note 19. Since 40% of Hong Kong's population are not BDTCs, the proportion of BDTCs who are Hong Kong residents is different; nevertheless about 97% of all BDTCs are in Hong Kong. The significance is obvious; without Hong Kong there is no point in the category of BDTC existing.

¹⁰⁰ An immediate catalyst for the merger of U.K. and P.R.C. interests was business confidence, or lack thereof. The U.K. Government's Introduction to the Draft Agreement in paragraph 5 refers to the fact of leases (i.e. commercial leases granted by the Hong Kong Government) expiring three days before July 1, 1997, and that "[i]t was clear that the steadily shortening span of these leases, and the inability of the Hong Kong Government to grant new ones extending beyond 1997 would be likely to deter investment and damage confidence." *See supra* note 95. This was thought likely to be a problem from the mid-1980s. *Id.* paras. 6, 7.

¹⁰¹ Joint Declaration, *supra* note 95, para. 3(1).

¹⁰² *Id.*

¹⁰³ *Id.* para. 3(5).

¹⁰⁴ *Id.* para. 3(10). This policy was reiterated in the Chinese Memorandum on nationality. There was clearly no need for an equivalent statement in the U.K. Memorandum. Exchange, U.K. Memorandum, *supra* note 95.

¹⁰⁵ Joint Declaration, *supra* note 95, Annex I.

¹⁰⁶ *Id.* Annex I, § XIV.

and Annexes.¹⁰⁷ The Chinese Memorandum asserts that "[u]nder the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the 'British Dependent Territories citizens' Passport' or not, are Chinese nationals."¹⁰⁸

The general meaning of this statement is clear, and very much what one might expect. The phrase "Chinese compatriots," however, is puzzling. Although the surrounding text strongly implies that it is a term of art in Chinese nationality law, the only available translation of the P.R.C. Nationality Law does not use it.¹⁰⁹ No explanation is given in the Memorandum itself, but it is apt to exclude the ethnic minorities, as the nationality law's use of the *jus sanguinis* implies.¹¹⁰

B. *The Chinese Position on Freedom to Travel and Return*

Section XIII of the Elaboration merely reaffirms the existing Hong Kong freedom "of travel" without explanation.¹¹¹ Section XIV, however, stipulates who shall have the right of abode in Hong Kong and asserts a freedom to leave for the holders of certain travel documents, makes provision for the issue of travel documents, and grants to the HKSAR Government power over immigration control.¹¹²

1. Right of Abode

"Right of abode" is a term of art in U.K. immigration law¹¹³ and

¹⁰⁷ Exchange, *supra* note 95. The Exchange is exclusively concerned with nationality. One may infer that the device is a means by which each side might make assertions on the matter without the other feeling obliged to react to them.

¹⁰⁸ Exchange, Chinese Memorandum, *supra* note 95. The reference to BDTC passports is unnecessary insofar as the fact that U.K. municipal law ascribes one nationality is no barrier to Chinese municipal law ascribing another. Its function, no doubt, is to allow the Chinese Government to put on record its conclusion that since the U.K. never properly exercised sovereignty over Hong Kong, it could not (or should not) have ascribed a nationality to the population. The reference to passports as such must be read with a further reference in the Memorandum to immigration. See Immigration Act of 1971, *infra* note 113.

¹⁰⁹ NLPRC, *supra* note 44.

¹¹⁰ NLPRC, *supra* notes 46-47 and accompanying text; but see notes 48-49 and accompanying text. The Explanatory Notes seem to suggest this. See Explanatory Notes, *supra* note 95, para. 65. However, it is possible that it is a matter of poor translation, or a stylistic device to avoid saying "all Hong Kong Chinese nationals...are Chinese nationals" (cf. similar tautology in art. 2 of NLPRC) or to avoid writing out the Chinese nationality law *in extenso*, given a tradition that sets no great store by tight drafting. NLPRC, *supra* note 45, art. 2. It might also be a device to exclude political undesirables (given the overtones of "comrade").

¹¹¹ Joint Declaration, *supra* note 95, Annex I, § XIII. It also refers to a right "of movement." Possibly, this means a right of internal movement although this is unlikely given the tiny size of Hong Kong.

¹¹² *Id.* Annex I, § XIV.

¹¹³ See Immigration Act of 1971, § 1(1) (effectively a codifying statute). The term "right of abode" means the freedom "to live in, and to come and go into and from, the United Kingdom

could be helpful in this context.¹¹⁴ But it is not in Hong Kong immigration law.¹¹⁵ Also, it appears in an *ex parte* document of the Chinese Government.

In later paragraphs, however, section XIV refers to HKSAR travel documents as being universally valid, recording the holder's ability to return, and permitting the holders of valid travel documents to leave without special authorization "[u]nless restrained by law."¹¹⁶ These paragraphs may give some meaning to the term right of abode, and one consonant with the phrase in U.K. law.¹¹⁷

In contrast, the categories of people entitled to identity cards stipulating their right of abode are defined with some exactitude. Essentially, these categories are:

- 1) all Chinese nationals born in Hong Kong at any time, and their children wherever born;
- 2) all Chinese nationals with seven years of continuous "ordinar[ly]" residence in Hong Kong at any time, and their children wherever born;
- 3) all non-Chinese nationals with seven years of continuous "ordinar[ly]" residence in Hong Kong at any time *and* who "have taken Hong Kong as their place of permanent residence," and their children under 21 years of age;
- 4) any person who had "the right of abode only in Hong Kong"

without let or hindrance except such as may be required under and in accordance with this Act to enable the right to be established or as may be otherwise lawfully imposed on any person." *Id.* There is also an inconsistent usage of the same phrase in European Community Law, but this can be ignored.

¹¹⁴ It would also be echoed in part by various other statements in section XIV, such as the reference to those who have a "right of abode only in Hong Kong" and the penultimate paragraph which reads: "[u]nless restrained by law, holders of all travel documents shall be free to leave the Hong Kong Administrative Region [HKSAR] without special authorisation." Joint Declaration, *supra* note 95, Annex I, § XIV. At paragraph 49, the Explanatory Notes refer to "the right of abode (including the right to enter, re-enter, live and work)" and, at paragraph 51, assert that the Elaboration "makes clear that the right to leave the Hong Kong SAR for any purpose, e.g. business, study or emigration, will be maintained subject to the normal exceptions under the law." See Explanatory Notes, *supra* note 95, paras. 49, 51. The Explanatory Notes also assert "that the rights and freedoms previously enjoyed under the laws of Hong Kong will be maintained," and "that the provisions of the International Covenants on Civil and Political Rights . . . as they apply to Hong Kong, will continue to apply . . ." *Id.* para. 43.

¹¹⁵ Indeed it contains no generalization of that nature, merely a reference to the "right to land."

¹¹⁶ Joint Declaration, *supra* note 95, Annex I, § XIV (second, third & sixth unnumbered paragraphs).

¹¹⁷ Thus, while there is no reason to assume identity with the "right of abode" in U.K. law, taken at face value, it could amount to the same thing, subject to the reference to "travel documents."

before July 1, 1997.¹¹⁸

One significant feature of these categories is that not all Chinese nationals acquire a right of abode in Hong Kong;¹¹⁹ another is the limited importance accorded to Chinese resumption of sovereignty on July 1, 1997.¹²⁰ Also, it seems that seven years of continuous residence does not have to be accrued in adulthood and, once accrued, is not lost by residence elsewhere.¹²¹ On the other hand, this list contains some imponderables. Although right of abode has no technical meaning here, the reference to it presumably must refer to "Hong Kong believer" status.¹²² Furthermore, determining those with no equivalent status elsewhere for the purposes of the fourth category poses an empirical question.¹²³

Nevertheless, the right of abode is clearly distributed widely. Nearly all Hong Kong believers are Chinese nationals and fall into the first category, while the Chinese residents of Hong Kong fall into the second. Ethnic minorities will normally fall into the third; the fourth is a useful catch-all.

Precisely who is affected depends upon the complex interaction of Chinese nationality law, the Hong Kong Immigration Ordinance, and U.K. nationality law and these complexities will not be pursued here. However, it appears that the only likely groups who are already "Hong Kong believers" and fail to acquire the right of abode are 1) those ex-Chinese nationals who have acquired a foreign nationality (thereby forfeiting Chinese nationality), and 2) those ethnic minority members who either do not have seven years continuous residence in Hong Kong or do not have Hong Kong as their permanent residence.¹²⁴ It is possible

¹¹⁸ Joint Declaration, *supra* note 95, Annex I, § XIV. The Explanatory Notes assert, accurately, that the provision "provides for a high degree of continuity" as between "believer" status and the "right of abode." See Explanatory Notes, *supra* note 95, para. 48.

¹¹⁹ Indeed, later in section XIV it is clearly stated that other Chinese nationals "shall continue to be regulated in accordance with the present practice." Joint Declaration, *supra* note 95, Annex I, § XIV.

¹²⁰ The right is given to nationals born in Hong Kong either before or after this date (category 1), and to those achieving seven years of residence either before or after it (categories 2 and 3). *Id.*

¹²¹ This is important given the number of residents seeking to move abroad. If this inference is wrong, they might ultimately be treated as non-Chinese nationals (under NLPRC art. 9) with permanent residence abroad, thus ineligible under category 3. For further discussion, see *infra* note 124.

¹²² HKIO, § 2(1), sched. 1.

¹²³ Also, while "ordinary residence" may have a fairly fixed meaning in Hong Kong (or U.K. law), there is no reason to assume that this is the precise meaning intended here.

¹²⁴ Those who have acquired only "settled" or "landed immigrant" status appear to be unaffected. A substantial number of those who can afford to are said to be seeking the insurance of another right of entry. See, e.g., Cheng, *supra* note 97, at 5-6. Cheng recounts that the Dominican Republic gives a right of permanent residence to those buying land there, and citizenship to those with six months residence; they opened an office in Hong Kong to publicize this. *Id.* In 1985, Mr.

to conceive of other examples of greater or lesser plausibility.¹²⁵

In summary, it appears that while no precise meaning can be attached to the "right of abode," almost all existing "belongers" will continue to be able to leave and will be able to return (which implies a right to remain). However, the right to leave is bestowed "[u]nless restrained by law [upon] holders of valid travel documents."¹²⁶ The latter condition, taken at face value, makes departure not a fundamental right, but conditional upon documentation. The former condition is not inconsistent with the imposition of a particular form of travel document (the exit visa), but is not necessarily so sinister since similar words appear in U.K. law.¹²⁷ Nonetheless the issue of travel documents requires examination.

2. Travel Documents

The Elaboration expressly permits HKSAR residents to travel in and out of the HKSAR using documents issued by the HKSAR Government, or "by other competent authorities of the People's Republic of China, or of other states."¹²⁸ The Elaboration envisages the HKSAR Government issuing two sorts of travel instruments: passports and "travel documents."¹²⁹ Both are to be valid for "all states and regions" and record "the holder's right to return to the [HKSAR]."¹³⁰ Passports are for "all Chinese nationals who hold permanent identity cards of the [HKSAR]," whereas travel documents are for "all other persons lawfully

T.S. Lo, a prominent Hong Kong lawyer and former member of the Executive Council (who resigned over the nationality issue), set up the Hong Kong Freedom of Movement and Right of Abode Ltd., a non-profit-making company designed chiefly to circulate information on emigration. For reasons of confidentiality, it does not disclose information on the use of its services, but claims them to be considerable. In any case, people from Hong Kong have long emigrated to Singapore, the U.K. and elsewhere for economic reasons. For a discussion of the migration to the U.K., see HOUSE OF COMMONS, SECOND REPORT OF THE HOME AFFAIRS COMMITTEE SESSION, THE CHINESE COMMUNITY IN BRITAIN (1984-85) H.C. Paper No. 102; HOME OFFICE, GOVERNMENT REPLY TO THE SECOND REPORT FROM HOME AFFAIRS COMMITTEE, Sess. 1984-85, THE CHINESE COMMUNITY IN BRITAIN, 1985, CMND. No. 9586.

¹²⁵ One can, for example, become a "belonger" by marriage. HKIO, § 2(1), para. (a)(iv) ("Hong Kong believer"); *id.* sched. 1, para. 2(c). Such a person holding a nationality other than Chinese, and thus, presumably, holding a right of abode elsewhere, will fall into none of the categories. One can also become a believer by descent. *Id.* para. (a)(iii), sched. 1, para. 3(b). Such a person who is not a Chinese national and with less than seven years residence or with a right of abode elsewhere, will not either.

¹²⁶ Joint Declaration, *supra* note 95, Annex I, § XIV.

¹²⁷ See *supra* note 113.

¹²⁸ Joint Declaration, *supra* note 95, Annex I, § XIV. Presumably travel documents may be issued "by other states" only in the case of non-Chinese nationals, given the attitude of the Chinese to dual nationality. See *supra* note 50 and accompanying text.

¹²⁹ Joint Declaration, *supra* note 95, Annex I, § XIV.

¹³⁰ *Id.* The Central People's Government is also to assist in negotiations on visa abolition agreements.

residing in the [HKSAR].”¹³¹ Thus, the right of abode as such appears to attract no entitlement to a passport.¹³²

There is also the question of who will receive travel documents as opposed to passports. Recipients must be lawful residents, presumably permanent ones, but with no link to another state likely to grant them a passport.¹³³

The charitable conclusions are that there is some loose drafting, that documentation is required to exercise the entitlements to leave and return, but that the requirement is in order to record rather than restrict movement, and particularly that no exit visas will be required. This would be consistent with the general imperative of maintaining confidence.¹³⁴ But it is far from clear for whom the “non-passport” travel documents are intended. Questions of the issue of travel documents (in the generic sense) are very much left to the HKSAR Government.

3. Immigration Control

Section XIV of the Elaboration declares that the HKSAR Government “may apply controls on entry, stay in and departure from the

¹³¹ *Id.*

¹³² A holder of a permanent identity card is similarly not entitled to a passport since a permanent identity card is a necessary, but not a sufficient, condition. It is also unclear who will have, or whether anyone will be entitled to, such a card. The Explanatory Notes assert that “[t]he SAR Government will issue permanent identity cards to all those with a right of abode in the SAR.” See Explanatory Notes, *supra* note 95, para. 49. No doubt the existing practice whereby residents are required and, thus, entitled to hold identity cards (or other means of identification) will continue, but this is not made plain. It is unfortunate that the grant of such a document is apparently contingent upon the grant of another. HKIO, pt. IV(A).

¹³³ It appears from the Explanatory Notes that the ethnic minorities with the right of abode are intended to receive travel documents. See Explanatory Notes, *supra* note 95, para. 50. The Explanatory Notes also assert that ethnic minorities are likely to receive permanent identity cards. See *supra* note 132. However, since the ethnic minorities are probably not Chinese nationals, they do not fulfill the stated conditions. See *supra* notes 110-11 and accompanying text. Reinforcement for this conclusion comes from the following paragraph of section XIV which declares that “[h]olders of permanent identity cards of the [HKSAR] may have this fact stated in their travel documents as evidence that the holders have the right of abode in the [HKSAR].” See Joint Declaration, *supra* note 95, Annex I, § XIV. Thus, unless “travel document” is used in a different, generic sense, it is being declared that those who are not Chinese nationals, but who use Chinese travel documents (and thus possibly looked at askance by immigration authorities in third countries) will have the fact of their right to return stated on those documents. But the term may, in fact, be being used in the generic sense there, since the same paragraph contains a further reference to the entitlement of HKSAR identity card holders to travel documents. *Id.*

¹³⁴ However, inconsistent views from the P.R.C. have been voiced on various issues connected with the liberalizing effect of impending transfer on internal government. It would, in any case, be too sanguine to assume HKSAR residents will get passports with the ease to which residents of the United Kingdom, or the United States, or Hong Kong under the present regime are accustomed, especially since British National (Overseas) passports will be in circulation by then. See *infra* note 150 and accompanying text.

[HKSAR] by persons from foreign states and regions.”¹³⁵ Thus, control over “aliens” is entirely delegated. Neither the Elaboration nor the Explanatory Notes provide any express or implicit guidance on interpretation of immigration policy and procedure.

C. *The U.K. Position on Nationality*

1. Application of Precedents on Decolonization

The United Kingdom has considerable experience with decolonization, including its nationality aspects. These precedents could have been followed in the Hong Kong case, *mutatis mutandis*. Thus, all those claimed by China as Chinese nationals could cease to be BDTCs on July 1, 1997, subject to an “expatriate clause.”¹³⁶ However, the Chinese population will not receive the new citizenship of their own state, but that of an existing, alien¹³⁷ one. Also, the principles could only be applied with the “East African variation,”¹³⁸ since Chinese nationality law finds it difficult to include ethnic minorities.¹³⁹ They would thus be in a position similar to their East African counterparts.¹⁴⁰ Yet it would be anomalous for the Hong Kong Chinese even to remain BDTCs, as the East African solution would imply, since there would be no British dependent territory with which they were connected. China might also object to the implication that Hong Kong remains a British dependent territory. Logic would require the Hong Kong Chinese status to be transferred to British overseas citizenship, the category more or less created for the East African Asians.¹⁴¹ In any case, all those losing BDTC status would also thereby lose Commonwealth citizenship.¹⁴²

2. Guarantees to the Local Population

It would not be surprising if at least some of the population sought specific guarantees of their interests in the matter of nationality. These interests reside as much in freedom of travel and in the symbolism of

¹³⁵ Joint Declaration, *supra* note 95, Annex I, § 14.

¹³⁶ Cf. *supra* note 21 and accompanying text.

¹³⁷ “Alien” in the technical sense of U.K. municipal law (i.e. not a citizenship of a Commonwealth country). 1948 British Nationality Act, § 1(2). To people of Chinese origin it is clearly not “alien” in the popular sense.

¹³⁸ See *supra* notes 23-24 and accompanying text.

¹³⁹ This is because it operates essentially *jure sanguinis*. See *supra* note 46.

¹⁴⁰ See *supra* notes 23-27 and accompanying text. In fact, they are in many cases almost literal cousins, being part of the diaspora from the Indian subcontinent.

¹⁴¹ See *supra* notes 35 & 140 and accompanying text. China might also object to the implications of continued allegiance to the United Kingdom. For further discussion in U.K. municipal terms, see *supra* note 3.

¹⁴² The significance of this might in some eyes be debatable, since it carries rights neither to protection abroad nor entry to any territories whatsoever. However, in the United Kingdom it is municipal citizenship. See *supra* note 41.

nationality as in traditional concerns like protection abroad.¹⁴³

The United Kingdom, however, cannot give many meaningful guarantees in the face of Chinese power and jealousy on the subject, and is unwilling to pursue any policy with immigration implications. On the other hand, China wishes to maintain confidence, accepting the compromises involved.

3. The U.K. Solution—The “British National (Overseas)”

The aforementioned factors help explain the tenor of the U.K. Memorandum,¹⁴⁴ and its implementation in the resulting legislation. The U.K. Memorandum states that BDTCs by virtue only of a connection with Hong Kong will cease to hold this status on July 1, 1997,¹⁴⁵ and that no one will acquire the status by virtue of such a connection thereafter.¹⁴⁶ These persons can, however, “retain an appropriate status which, without conferring the right of abode in the United Kingdom, will entitle them to continue to use passports issued by the United Kingdom,”¹⁴⁷ and their holders “will be entitled to receive, upon request, British consular services and protection when in third countries.”¹⁴⁸

The effects of this settlement are rendered into U.K. law by the Hong Kong Act of 1985¹⁴⁹ which deals with the nationality provisions in a schedule. The schedule delegates power to the Government to implement the terms of the U.K. Memorandum, including creation of “a new form of British nationality the holders of which shall be known as British

¹⁴³ As noted, some residents are seeking a right of entry elsewhere as an insurance. See *supra* notes 121 & 124. Articulation of such concerns could be muted by the lack of any tradition of public, or even democratic, politics. It might also be muted by an ambivalence towards China on the part of some of those of Chinese origin who might have doubts about past and present policies, but are conscious of participating in the oldest continuous cultural tradition in the world.

¹⁴⁴ See *supra* note 107 and accompanying text.

¹⁴⁵ Exchange, U.K. Memorandum, *supra* note 95, para. (a).

¹⁴⁶ *Id.* para. (b).

¹⁴⁷ *Id.* para. (a). Paragraph (c) records that U.K. consular officials in HKSAR and elsewhere will be able to renew and replace their passports. *Id.* para. (c).

¹⁴⁸ *Id.* para. (d). This adds meaning to the phrase “appropriate status,” but thereby also demonstrates the extremely limited practical usefulness of such protection to its beneficiaries, for the vast majority will be Chinese nationals and thus not capable of being represented against the Chinese Government. See *supra* note 54. Diplomatic protection is not mentioned.

¹⁴⁹ Hong Kong Act, 33 & 34 Eliz. 2, ch. 15 (1985). House of Commons debates can be found at: 171 OFFICIAL REPORT, HOUSE OF COMMONS, Jan. 21, 1985, cols. 731-812 (2d Reading) (for insights into the nationality part of the package from statements by the Foreign Secretary and by two backbenchers knowledgeable on nationality law, though not necessarily in accord with the Government; *id.* cols. 733, 792-6, 1046-7); 72 OFFICIAL REPORT, HOUSE OF COMMONS, Feb. 6, 1985, cols. 1029-76 (Committee Stage and 3d Reading). For House of Lords debates, see 460 OFFICIAL REPORT, HOUSE OF LORDS, Feb. 19, 1985, cols. 481-598 (2d Reading); 461 OFFICIAL REPORT, HOUSE OF LORDS, Mar. 14, 1985, cols. 233-248 (Committee Stage). For discussion of the Act as a whole, see Wesley-Smith, *The Hong Kong Act 1985*, 1986 PUBLIC LAW 122.

Nationals (Overseas) ["BN(O)s"],"¹⁵⁰ and giving the power to require application for that status.¹⁵¹ These powers were exercised in the Hong Kong (British Nationality) Order in Council of 1986.¹⁵²

This Order in Council's import lies chiefly in implementation of the relatively simple policy outlined. Its terms, however, are extremely complicated because the complexity of U.K. nationality law makes it difficult to define "connection with Hong Kong."¹⁵³ BN(O) status creates a "gateway" to Commonwealth citizenship.¹⁵⁴

But why create a whole new nationality status? The obvious "appropriate status" for the former BDTCs was either British overseas citizenship as they will be the new "UK passport holders," or perhaps British subjects without citizenship since that accurately describes their position.¹⁵⁵ Possibly both options were unacceptable to China, carrying the implication that no real change had occurred.¹⁵⁶ Also, why is ascription of BN(O) status not automatic, but rather attained by application, albeit as of right?¹⁵⁷ Perhaps this is also to deflect Chinese jealousy on the question of diplomatic representation, but it creates a problem.

4. A Consequential Complication—Statelessness and the Extension of British Overseas Citizenship

All BDTCs by virtue of a connection with Hong Kong will lose that status on July 1, 1997,¹⁵⁸ though nearly all remain Chinese nationals. Also all BDTCs may, upon application before that date, become BN(O)s,¹⁵⁹ a status they retain for life. But what is the position of a

¹⁵⁰ Hong Kong Act, para. 2(1)(b).

¹⁵¹ *Id.* para. 2(2). Powers to deal with consequential and transitional matters are in paragraph 2(3). *Id.* para. 2(3).

¹⁵² Hong Kong (British Nationality) Order in Council, S.I. 1986, No. 948 [hereinafter Hong Kong Order]. This Statutory Instrument came into force on July 1, 1987, precisely ten years before the transfer. It was first issued, after pressure, as a draft for discussion in Parliament as Cmnd. 9637 with explanatory notes. See *supra* note 85 (note that the explanatory notes are inaccurate in para. 24(a)).

¹⁵³ See Hong Kong Order, art. 2. It also removes Hong Kong from the list of dependencies in the 1981 British Nationality Act with effect from July 1, 1977, thus preventing anyone from acquiring BDTC status by virtue of a connection with it after that date. Hong Kong Order, art. 5. There are other consequential provisions.

¹⁵⁴ *Id.* art. 7.

¹⁵⁵ See *supra* notes 15 & 35 and accompanying text. BSWCs are now predominantly Irish citizens (who have free entry into the United Kingdom).

¹⁵⁶ There is also a U.K. propensity to create new categories to cover difficult circumstances, which is most evident in the 1981 British Nationality Act.

¹⁵⁷ The schedule to the Hong Kong Act of 1985, the source of power to create the status, did not require an application, but merely permitted it.

¹⁵⁸ Hong Kong Order, art. 3.

¹⁵⁹ *Id.* art. 4. Those born between January 1 and July 1, 1997, have until Dec. 31, 1997, to apply. *Id.* art. 4(2).

BDTC who is not a Chinese national and fails to apply to become a BN(O)? What is the status of a child born after 1997 to a BDTC who becomes a BN(O) but who is not a Chinese national?¹⁶⁰ The brief answer is that, if otherwise stateless, the Order provides that the person in question automatically becomes a BOC.¹⁶¹ This apparent paradox is logical insofar as there is a parallel in the case of East African Asians, and there is no Chinese jealousy to contend with regarding such people.

There is a further, major paradox, however. These BOCs will have children born in Hong Kong after July 1, 1997. So will BN(O)s who are not Chinese nationals. Not having originally been BDTCs, the children cannot become BOCs by their parents' route; not having Chinese national parents, they will not become Chinese nationals. They would thus be stateless, at least at birth—indeed, so might their children, and subsequent generations.

Insofar as this position results from Chinese reliance upon the *jus sanguinis*, it is a Chinese problem. Insofar as the existing BDTCs presently look to the United Kingdom, it is a U.K. problem. The solution adopted by the United Kingdom is to make BOC status available automatically to the first generation (i.e. those otherwise stateless children of BN(O)s and BOCs),¹⁶² and upon application to the second generation (i.e. generally those with a parent or grandparent, respectively, who was a BDTC by connection with Hong Kong and who lost that status on July 1, 1997).¹⁶³ There could, thus, be such BOCs living well after the year 2100!¹⁶⁴

V. CONCLUSIONS ON THE NATIONALITY ASPECTS OF THE SETTLEMENT

Once it was accepted that the United Kingdom was giving up control of Hong Kong, the broad outlines of the nationality provisions were

¹⁶⁰ This question is pertinent since article 3 bestows British Nationals (Overseas) status only upon those BDTCs who have a connection with Hong Kong and who apply before July 1, 1997.

¹⁶¹ Hong Kong Order, art. 6(1). There is a minor paradox in that British Overseas citizen status was originally intended (subject to minor exceptions, *see supra* note 38) to be obtained only upon the coming into force of the British Nationality Act of 1981 on Jan. 1, 1983, and thus to be a finite and declining category from a date seventeen-and-a half years before this extension takes place on July 1, 1997. *See supra* note 29.

¹⁶² Hong Kong Order, art. 6(2).

¹⁶³ *Id.* art. 6(3)-(5). The drafting is complicated, mirroring section 17 of the 1981 British Nationality Act. *See* 1981 British Nationality Act. Application is normally required within twelve months of birth. Those failing to have an application made on their behalf will remain stateless. If China treats them as having parents who are stateless or of uncertain nationality settled in China under article 6 of NLPRC, then they are not stateless *ab initio*, and thus are ineligible for the U.K. provision. *See supra* note 49.

¹⁶⁴ It is likely that both U.K. and Chinese nationality law will have changed by then. Nevertheless, there will presumably have to be transitional provisions.

inescapable. After July 1, 1997, China would control the land and population, and the United Kingdom could have no pretensions to claim allegiance or offer protection, except by China's leave. That China already claimed the population at large as its nationals makes no difference. Interest thus focuses on a number of subordinate themes.¹⁶⁵

A. *Do the Arrangements Maintain Confidence?*

Presumably the two signatories have confidence in the arrangements although both were constrained in their negotiations. The settlement as a whole was tested for its acceptability to the population of Hong Kong. An Assessment Office was set up for this purpose and reported favorably.¹⁶⁶ Overall acceptance was tempered by concern on implementation, and a minority had either expressed serious doubts or rejected the proposals.¹⁶⁷ It may be assumed that this general support was partly due to the maintenance of a nationality status termed "British."

On nationality *stricto sensu*, qualms were expressed on the removal of BDT status¹⁶⁸ and the need for consular representation of BDTs and BN(O)s in the HKSAR.¹⁶⁹ Concern was also expressed as to the apparently "nebulous"¹⁷⁰ nature of the concept of Chinese national status and its application to those holding foreign passports and those of mixed parentage.¹⁷¹ Bitterness was felt towards the United Kingdom for having agreed to strip millions of people of their nationality. This bitterness partly reflected concern at the lack of an escape route,¹⁷² such as

¹⁶⁵ One theme inappropriate to deal with here, being a matter of distress for its practitioners only, is the consequential effect of increasing the complexity of U.K. nationality law still further.

¹⁶⁶ HONG KONG: ARRANGEMENTS FOR TESTING THE ACCEPTABILITY IN HONG KONG OF THE DRAFT AGREEMENT ON THE FUTURE OF THE TERRITORY, CMND. NO. 9407 [hereinafter ASSESSMENT REPORT] (especially ch. 3). This Office was concerned with being viewed as independent and accurate, and was itself subject to review by a Monitoring Team. (The Report of the Monitoring Team was published with the Assessment Office Report, and declared the Team satisfied with the Office's efforts). The Assessment Office conclusion mirrored opinion in the media, of representative bodies, of individuals, and of a commissioned opinion survey. The lack of a tradition of public debate is referred to above. See *supra* note 143 and accompanying text.

¹⁶⁷ ASSESSMENT REPORT, *supra* note 166, paras. 3.19-25.

¹⁶⁸ *Id.* para. 4.65.

¹⁶⁹ *Id.* para. 4.69.

¹⁷⁰ The word is used in the Assessment Report itself. *Id.* para. 4.52. It is not explained and may refer to the lack of any declaration of the rights and obligations of Chinese nationals (notwithstanding the guaranteed rights in the first Annex to the Joint Declaration), although it is immediately followed by reference to the questions of foreign passports and mixed parentage mentioned in the text.

¹⁷¹ *Id.* para. 4.52.

¹⁷² *Id.* para. 4.67. Paradoxically, some respondents argued that the existence of an escape route would be enough, for few would use it. In other words, it would not be an escape route, but a security blanket.

entry to the United Kingdom, and partly reflected a sense of betrayal.¹⁷³ It was also suggested that criteria for naturalization as a BDTC might be relaxed to allow greater access to BDTC and BN(O) passports.¹⁷⁴

On the issue of the right to travel there was concern chiefly at the lack of a clear statement of a right to emigrate,¹⁷⁵ and as to the acceptability to third countries of BN(O) and HKSAR passports¹⁷⁶ (as well as consular protection in HKSAR).¹⁷⁷

In addition, the Hong Kong Legislative Council requested some amendments to U.K. law and practice.¹⁷⁸ First, the Legislative Council sought endorsement of BN(O) passports to show that the holder was entitled to seek entry to the United Kingdom to visit. This was readily conceded undoubtedly because it is almost meaningless.¹⁷⁹ Second, the Legislative Council sought a form of registration for Hong Kong BDTC ex-servicemen wishing to become British citizens. Only small numbers of Hong Kong people are affected, and the U.K. Government asserted that they were effectively covered by existing legislation.¹⁸⁰ Finally, the Legislative Council sought a similar concession for ethnic minorities. This, the only major concession sought, was not acceded to. The Gov-

¹⁷³ The Assessment Report recounts the following two individuals' comments: "With one stroke of the pen you have stripped us of our identity and slotted us into racial categories—an unforgivable [sic] act . . ." and "I feel the oath of allegiance to the Queen [upon naturalization] to be very serious and am disillusioned with what the British Government has done." *Id.* para. 4.66.

¹⁷⁴ Therefore, "Chinese residents" might more readily become BDTCs and thus applicants for BN(O) status and passports. *See supra* note 91.

¹⁷⁵ ASSESSMENT REPORT, *supra* note 166, para. 4.53.

¹⁷⁶ *Id.* paras. 4.54, 4.69. Also raised was the question of the maintenance of existing immigration quotas for Hong Kong in third countries, and of travel to countries not recognized by China.

¹⁷⁷ *See supra* note 169.

¹⁷⁸ 6 OFFICIAL REPORT, HOUSE OF COMMONS, Apr. 24, 1986, cols. 146-48 (W.A.).

¹⁷⁹ *Id.* No special entitlement to apply as a visitor is required except for Visa nationals, and the United Kingdom requires such visas from comparatively few countries. For the immigration rules, see HOUSE OF COMMONS, STATEMENT OF CHANGES IN IMMIGRATION RULES app. (No. 169, 1982-83). Immigration officials in the United Kingdom know prevailing law and practice without need for such a reminder. The apparent concession relates to visits only, not to entry for settlement which still requires an "entry certificate" (i.e. a visa). *Id.* pt. IV.

¹⁸⁰ *Id.* About sixty ex-servicemen who served during the Second World War in the Royal Hong Kong Regiment—The Volunteers (then known as the Hong Kong Defence Force)—were declared eligible to register as British citizens under the curious section 4(5) of the 1981 British Nationality Act, but with no promise of success. *See* 1981 British Nationality Act; *supra* note 40 and accompanying text. The majority of those who so served are probably British citizens already, being born in the United Kingdom or descended from a father so born, since it appears that only recently have many people of Chinese origin been recruited. HONG KONG GOVERNMENT INFORMATION SERVICE, HONG KONG: THE FACTS: ROYAL HK REGIMENT (THE VOLUNTEERS) (1986). About 270 others who served in the defense of Hong Kong, but who do not fulfill the requirements of section 4(5) of the 1981 British Nationality Act, were also considered to be eligible for settlement on arrival in the United Kingdom. However, they would not thereby become British citizens and would presumably be required to have "entry certificates" like all others seeking settlement. *See supra* note 179.

ernment asserted that the settlement met their needs and that "British citizenship would not strengthen the position of the [ethnic minority] communities in Hong Kong."¹⁸¹

As to the question of maintaining the confidence of the rest of the world, it is both too early to say and impossible to disentangle the nationality provisions from other aspects of the transfer of sovereignty. Reaction in Taiwan will be most important to watch.

B. Is China's Attitude Reassuring?

Since China regards U.K. control of Hong Kong as little short of usurpation and considers that the population, with few exceptions, are all Chinese nationals already, acceptance of BN(O) status was a reassuring concession. The guarantees in relation to freedom of travel, though inexplicit, are significant. On the other hand, it would have required only a tiny and costless further concession to permit BDTCs, not already Chinese nationals, to register as such, thus avoiding the need for the tortuous provisions in the U.K. legislation avoiding statelessness.

C. Has the United Kingdom Fulfilled Its Obligations?

This query begs many questions. On detailed matters it appears that the United Kingdom could have been more generous. The principal example is in relation to the status of ethnic minorities.

Also, a number of police and civil servants are apprehensive lest old scores be settled under the new regime. Section 4(5) of the 1981 Act may be applicable, but only at the Secretary of State's discretion.¹⁸² Further, others are apprehensive since they are refugees from China and no provision caters to them.

It is also tempting to make a cynical comparison with the Falkland Islands.¹⁸³ However, mere skepticism is the more sensible response. Further, the reassurance implied by BN(O) status is somewhat illusory for its holders since they cannot be protected against China, the only state against which they are likely to require protection.¹⁸⁴ The pruden-

¹⁸¹ *Id.* This seems disingenuous. In the Parliamentary session in 1986-87, the Home Affairs Committee of the House of Commons examined the subject of "passport control." 247 HOUSE OF COMMONS, FIFTH REPORT OF THE HOME AFFAIRS COMMITTEE SESSION, PASSPORT CONTROL (1986-87) (May 7, 1987). This was prompted by the proposed Channel Tunnel to Continental Europe (now due to open in 1993). No doubt because of this limitation, no attention was paid to the issue of passports and Hong Kong. It may well be that this Committee or another will consider aspects of nationality, immigration and Hong Kong as 1997 approaches. See *infra* note 184 and accompanying text.

¹⁸² See *supra* notes 40, 180. It is understood that a number of police have applied, but that their applications have not yet been dealt with.

¹⁸³ See *supra* note 98.

¹⁸⁴ As noted (*supra* note 155), they are genuine, if not technically, UK Passport Holders and

tial consideration of the confidence of others may have been at least as important in the creation of BN(O) status.

With respect to the broad policy, however, there were few choices, which implies that no blame attaches. Indeed, the Agreement itself, as opposed to its detailed implementation in U.K. municipal law (still prisoner to a fear of "coloured immigration"), probably extracted as many concessions as it could. Nevertheless, 3.5 million BDTCs and 2 million aliens currently under U.K. protection are to be transferred to the control of another state, without requiring their consent.

British subjects without citizenship. *See supra* notes 15 and 28 and accompanying text. In an Exchange of Memoranda dated April 11, 1986 (but unpublished in the U.K.), the governments of the U.K. and the P.R.C. noted and agreed that new identity cards would be issued in Hong Kong differentiating between those with a right of abode and those without. Neither card specifies a replacement date and both would be used after 1997 until replaced by the HKSAR Government. Furthermore, BN(O) passports are to be issued both before and after 1997 with an endorsement declaring the right of abode in Hong Kong, where applicable and a permanent identity card number. The replacement identity cards issued by the HKSAR Government will use the same number. This seems a very cozy relationship.

